(3)

No. 96-663

In the
Supreme Court of the United States
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

Petitioners,

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

Petitioners, Marvin and Mary Klehr, are Minnesota dairy farmers who appeal from a summary judgment, dismissing their RICO claim on statute of limitations grounds. They raise two issues on appeal:

1. Does the statute of limitations bar Petitioners' civil RICO claim where Respondents continued to commit predicate acts and the Petitioners suffered additional, continuous and accumulating injuries to their business and property within four years of commencing suit?

2. Did Respondents' fraudulent, self-concealing conduct and acts of fraudulent concealment suspend the statute of limitations on Petitioners' civil RICO claim?

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CITATION OF THE OFFICIAL REPORT OF THE UNDERLYING OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 87 F.3d 231 (8th Cir. 1996). The opinion of the United States District Court for the District of Minnesota is reported at 875 F. Supp. 1342 (D. Minn. 1995).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment by denying the Petition for Rehearing on July 29, 1996. Petitioners filed their Petition for Certiorari on October 24, 1996. This Court granted the Petition on January 10, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AT ISSUE

18 U.S.C. §1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1)(B) to include "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . ."

"Pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as "requir[ing] at least two acts of racketeering activity, . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

18 U.S.C. § 1964(c) provides:

> any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE AND FACTS

I. A.O. Smith Begins to Manufacture the Harvestore.

In 1949, A.O. Smith ("Smith") began to manufacture and sell a new "Harvestore" silo which, it claimed, combined superior feed with labor saving hardware that automatically unloaded and delivered the feed to livestock. *See, e.g.*, Appendix/Lodging ("App.") 714-16; 823-24; 719-20; 740-42. Smith and its wholly-owned subsidiary, A.O. Smith Harvestore Products, Inc. (collectively, hereinafter "AOSHPI"), marketed and manufactured this "revolutionary" Harvestore silo through authorized dealer/agents.

AOSHPI claimed that the Harvestore minimized spoilage by preventing oxygen from coming into contact with stored feed. *See, e.g.*, App. 715-16. Although it had not discovered how to retard feed spoilage in silos, AOSHPI manufactured a silo which *appeared* to "seal" stored feed from the outside air, modeling the Harvestore after the glass canning jars with which farmers were familiar. App. 668. In sales

presentations, AOSHPI highlighted the silo's "marine-type" doors and "hatches" with gaskets. App. 715; 772; 781; 668. AOSHPI's promotion of the "oxygen-limiting" idea did not stop at mere appearances, however. In advertisements it published for more than forty years, AOSHPI repeatedly told farmers that the Harvestore would prevent air from coming into contact with the feed. *See* App. 774; 749-75.

II. Why Harvestores Don't Work.

A. A Closed System Must "Breathe."

AOSHPI's "revolutionary" idea did not work in practice because a silo cannot be sealed. First, a sealed container must have a way to exchange gas or "breathe" in order to equalize the pressure of the gas inside as it expands and contracts with changes in air temperature. App. 823-24; 774; 659. Second, farmers must open silos at the bottom several times every day to remove feed for cattle and open them at the top, periodically, to fill them. No one has solved the problem of "sealing" a silo under these conditions. *Cf.* App. 658-59. But AOSHPI claimed it had. App. 781.

AOSHPI told farmers that it solved the first problem by using a lung-like "breather" bag system. App. 686; 781. The breather bags hang at the top of the silo and, theoretically, expand and contract to accommodate head space gas expansion and contraction due to daily temperature changes. *Id.* AOSHPI claimed that any oxygen entering the silo would be contained in the breather bags and would not contact the feed. App. 780-81.

AOSHPI told farmers it had also solved the problem of air leakage during periodic filling and daily feeding. It claimed that air entering the silo during filling and feed-out would be converted in the fermentation process to a harmless gas within a short time. App. 812; 781.

B. Harvestore Research Demonstrates that AOSHPI's Claims are False.

AOSHPI knew from its own research studies that no science stood behind its claims. Its research had not only failed to prove that Harvestores actually worked, but repeatedly demonstrated that AOSHPI's claims were false. AOSHPI's scientists confirmed that when a farmer opened the unloader door to remove feed for his livestock, the breather bags in the silo collapsed, causing air to rush into the silo. App. 916; 899-900; 890. Negative pressure and the pumping action of the unloader then forced oxygen into the feed mass itself instead of merely exposing the surface feed to air as in a conventional silo. App. 916-18; 957-59. *See Estate of Korf v. A.O. Smith Harvestore Prods., Inc.*, 917 F.2d 480, 482 (10th Cir. 1990).

AOSHPI knew that exposure to oxygen levels greater than 2% causes heat damage and spoilage to feed and reduces its nutritional value. App. 892. In a Harvestore, oxygen contact with the feed exceeds 20% within minutes after the silo is opened for feeding and never returns to less than 6% during the daytime. App. 899-900. *See also* App. 907 (oxygen reaches feed at every feed-out); App. 914 (oxygen reaches feed 96% of days in last four months of storage). Thus, AOSHPI's scientists observed: "Filling and feed out operations present a structure atmosphere control problem." App. 900.

Despite extensive testing over many years, AOSHPI never solved its "structure atmosphere control problem":

> We in R&D do not have any good information on what percentage of operating Harvestore systems might be judged unsatisfactory with respect to oxygen exposure.

App. 922. *See also* App. 875-77; 921; 926 ("There are great information gaps in our knowledge."). By 1982, AOSHPI's engineers still did not know how to make "the Harvestore system" work. App. 958

Yet, during the forty years that AOSHPI conducted its internal research, it continued to market the Harvestore silos as oxygen-free/oxygen limiting without significant design changes. Knowing that the oxygen which infiltrated at each feedout could cause heat damage to silage, it told farmers that its engineers had designed a system that "did not allow the structure to fill with oxygen" during unloading. App. 820. AOSHPI also continued to tell farmers that the "Harvestore system protects stored feeds from oxygen" and that "[t]he Harvestore . . . system prevents oxygen from coming into contact with the feed." App. 774, 715; 780. *See also* App. 488-92.

III. AOSHPI Conceals the Fraud.

In order to continue to sell Harvestores, AOSHPI needed to prevent farmers from suspecting that their Harvestore claims were false. Their concealment effort was a major component of their overall marketing strategy.

A. AOSHPI Told Farmers That Damaged Feed Was "Good Harvestore Feed."

The most ingenious idea that AOSHPI devised to avoid detection of its nationwide fraud on farmers was an advertising strategy which capitalized on the Harvestore's production of spoiled feed. As AOSHPI knew from its years of research, feed which is warm to the touch, dark in color and smells of molasses is heat-damaged. App. 162, ¶2(A); 166-67, ¶7. Heat damage occurs when feed is exposed to oxygen. *Id.* Heating of feed destroys the nutritional value of the stored

feed, binding the proteins and carbohydrates and making them undigestible and nutritionally unavailable to the cow. *Id.* When heat-bound protein is fed to a cow, the cow is unable to digest the protein and receives a deficient diet. App. 162, ¶2(A). It will experience weight loss, a drop in milk production, a drop in reproductive performance and a reduction in overall health. App. 158, ¶9. *See also Lollar v. A.O. Smith Harvestore Prods., Inc.*, 795 S.W.2d 441, 444 (Mo. Ct. App. 1990).

AOSHPI ran a series of "scratch and sniff" advertisements which employed a burnt molasses odor to characterize the smell of "good" Harvestore feed. App. 804. This odor actually describes feed damaged by excessive oxidation. App. 162, ¶2(A). *See also* App. 659. AOSHPI also ran ads which advised farmers that they should expect warm feed and that the warm feed was particularly good for cows. App. 172, ¶4. By telling farmers that they should expect warm, dark feed that smelled of molasses, AOSHPI prevented farmers from suspecting that there was anything wrong with the silo when they observed these characteristics in their Harvestore feed.

B. Harvestore Construction Made Detection of the Scheme Difficult.

1. Farmers cannot examine the inside of the silo while it is in use.

The basic premise of a Harvestore is that it is a "sealed" system. Except for a small opening at the top of the silo where the farmer automatically blows in feed and a small opening at the bottom where the chain unloader protrudes, it contains no doors or windows. App. 772. If a farmer were to climb the silo and look into the small opening at its top, it is unlikely that he would detect any problem with the feed since AOSHPI had taught him that heat damaged feed was "good

Harvestore feed." App. 772; 177, ¶11. It would be equally difficult for a farmer to detect any problem with the feed by looking into the Harvestore at the bottom. The silo's "access" panel consists of a small plate bolted onto the Harvestore just above the small opening for the unloader chain. AOSHPI put a sign over the plate which warns:

DANGER
DO NOT ENTER
NOT ENOUGH OXYGEN
TO SUPPORT LIFE

See App. 655 (Picture); 654. Even were a farmer to unbolt the access door, all he would see is a solid three-four foot deep wall of "good [heat-damaged] Harvestore feed." App. 669. This silage is under tons of pressure and is "extremely hard to chop even with an ax." App. 658. As described below, any molds grew in the interior feed dome deep within the silo.

2. The unloader grinds signs of mold into the feed.

One of the "revolutionary" features of the Harvestore is that the silo unloads from the bottom rather than the top like a conventional silo. *See, e.g.*, App. 686; 720. Bottom unloading of forage feeds is possible only because the Harvestore is sold with a chain unloader similar to mining machines used to "chew coal from veins deep beneath the earth." App. 720. This unloader can remove feed that is not "free-flowing" and is under tremendous pressure from the feed stack above. App. 824; 658. The chain unloader "chews" through the feed, blending the layers as the feed comes out of the silo. App. 824; 689.

Exposure to oxygen causes mold growth as well as heat damage to feed. Vast amounts of mold grow primarily in the "dome" in the bottom of the feed stack created by the action of the chain unloader App. 669. The chain unloader systematically chops this mold into the feed as the feed is discharged so that it is not readily discernable to the farmer. App. 177, ¶11.

C. AOSHPI Invited the Farmers' Reliance.

AOSHPI provided Harvestore owners with a deluge of post-sale advertising calculated to build the farmers' trust in the company and assure him that: (1) AOSHPI was an established business and could be trusted; (2) years of research, both internal and "independent," confirmed AOSHPI's claims; and (3) many, many "smart" and successful farmers have put Harvestore principles into practice through every day use of the silos. App. 808-809; 730-32.

AOSHPI's entire "after sale" campaign was calculated to prevent farmers from learning that the feed from their Harvestores was no better than the feed from ordinary silos and could actually harm the farmers' cattle and business.

1. AOSHPI Claims Harvestores Are Backed By Years of Research.

AOSHPI told farmers that the Harvestore was backed by years of research and that the research would be disclosed to the farmer. App. 657 (research findings are "passed along to . . . dealer" who, in turn, makes them "available to you"); App. 782 (results are "available"); App. 779 (Harvestore based on "basic, proven principles"); App. 809 (continuing research at more than 60 colleges and universities). In order to add credibility to the research, they hired "independent" experts, including Professor George Marx, to publish

educational information about feed storage. Professor Marx gave live presentations regarding Harvestore storage to dairymen. App. 477-81. AOSHPI never disclosed to Dr. Marx, however, any of its own internal research which demonstrated that it had been unable to seal the silo. App. 481-83. Thus, AOSHPI used its long history and years of research to cultivate farmer trust and confidence, but rather than making its research available to the farmers, selectively published the good parts of the studies and buried the bad. App. 492-93; 730; 705-706. Farmers were led to conclude that there was no question that the silos performed as represented.

2. AOSHPI claimed that Harvestore farmers were "smart" and "happy" farmers.

Not only did Harvestore advertisements invite trust and confidence in AOSHPI, they suggested that there were many "smart" Harvestore farmers who were happy and satisfied with their silos. App. 807 ("60,000 . . . structures in use around the world."). Harvestore magazines contained numerous success stories and testimonials. App. 812-13; 51-60; 709-11. AOSHPI's marketing materials created a general belief in the dairy industry that Harvestores were the best available feed storage system. App. 176, ¶9. As a result, AOSHPI sold tens of thousands of Harvestores throughout the country. App. 807. The fact that thousands of blue Harvestore silos dotted the countryside suggested to farmers that the basic design of the Harvestore was sound.

3. Harvestore "experts" provided farmers with advice and help.

Emphasizing its superior knowledge of the scientific aspects of farming and feed storage, AOSHPI "educated"

farmers about the principles which it asserted "proved" that Harvestores worked. It provided farmers with countless articles and seminars. *See, e.g.*, App. 730; 676-77; 745; 467-68. It counseled complete farmer reliance on its salesmen to assist with all aspects of farm management. App. 690-91 (The Harvestore dealer "doesn't figure his job is done when a Harvestore is sold—he realizes that a sale marks the start of his real job.. . . Counseling owners on proper farm management practices is an important part of the Harvestore sales representative's job"); App. 717; 657; 721; 745; 768-69 (your "Partner in Progress—Count on him"). Farmers were told that Harvestore dealers would provide: "Counseling and assistance in areas such as feedlot planning, feedroom layout and ration formulation." App. 745. Thus, Smith and AOSHPI advised:

> Your local Harvestore representative is more than a salesman . . . He's been through an intensive training program to learn the latest in crop management . . . animal nutrition . . . farmstead planning...agriculture finance and other key farm management areas. Add to all that his special knowledge of crop and livestock conditions in your area and you can see why he's a good man to know. . . .Your Harvestore man is no theoretical dreamer . . . the information he'll give you is based on the experiences of thousands of successful Harvestore farmers around the world. And, backing him up is the world's largest manufacturer of feed processing and automation equipment . . . with more than a quarter century of helping farmers boost profits.

App. 721 ("Meet your Agribusiness Answer Man"). *See also* App. 792.

AOSHPI's "expert" representatives contacted farmers periodically after the silo sale. If the farmer told the Harvestore salesman about a farm problem, the salesman would tell farmers that the problem was attributable to silo maintenance or farm mismanagement. App. 461-64. The salesmen were trained to advise farmers that any mold they saw in feed was normal and would not harm the cows. App. 470-71.

After constant exposure to AOSHPI's post-sale messages, the farmer was highly unlikely to suspect that any problems he was experiencing on his farm were caused by his revolutionary Harvestore silo. It was far more likely that a farmer would conclude that if there was a problem, its source lay in his own practices. *See, e.g.*, App. 484-85 (Harvestore dealer describes how he blamed himself for his own farm problems).

D. AOSHPI Suppressed Complaints and Prevented the Dissemination of Research Information.

Despite AOSHPI's concealment of the fraud, problems with the silos surfaced in California and farmers began to sue. App. 486-92. AOSHPI's internal research studies figured prominently in these suits. App. 873-74. Rather than cease manufacturing the silos, however, AOSHPI simply stopped selling in California. App. 492-94.

It then adopted internal procedures to prevent leakage of internal research information to the public in future lawsuits. As part of this scheme, James N. Johnson, Smith's corporate counsel and vice president, laid the groundwork to falsely claim the attorney-client privilege:

> In many respects, these memos formed every bit as much damning evidence as did any of the

advertisements or promotional pieces upon which Plaintiffs sought to rely.

* * *

. . . [A]nd when it appears that its mechanical problems are yet far from solution, I suggest that the writings with respect to such problems be kept to an absolute minimum and, to the degree that they appear to be necessary, they should be addressed to the Law Department, . . . so that each memo will receive, . . . the mantel of privileged communication and, thus, be secure from seizure by subpoena in discovery proceedings if additional litigation should ensue.

App. 873-74 (emphasis in original). As a result of AOSHPI's systematic concealment of documentary evidence, there is no way of knowing what additional damaging research information has been or still is in AOSHPI's possession.

IV. Marvin and Mary Klehr Purchase their Harvestore.

Marvin and Mary Klehr are Minnesota farmers, who first became ensnared in AOSHPI's Harvestore scheme in 1974. Marvin grew up on the family's farm and attended school through the 10th grade. App. 196. In 1974, the 29 year-old Klehr had had full responsibility for the family farm for one year.

That year, Richard Deutsch, an employee of MVBA Harvestores Systems ("MVBA") an authorized AOSHPI dealer, gave the Klehrs printed information about the purchase

of a Harvestore silo.[1] App. 219. Deutsch told Klehr, and the written material and films Deutsch gave him confirmed, that the silos were "oxygen free/oxygen limiting" because the breather bag system kept oxygen from coming into contact with feed. Klehr was told that good Harvestore feed would be warm and dark and smell of molasses. App. 171-72; ¶¶ 2, 3, 4; 420-21. Based on these oral representations and printed material, the Klehrs bought a 25 foot x 80 foot Harvestore silo for $64,000 on July 15, 1974. App. 171, ¶2; 455-57; 649.

Klehr began using the silo during the summer of 1975 to store alfalfa haylage. App. 172, ¶4; 274. Each time he filled it, the feed turned brown and warm and smelled like molasses. App. 172, ¶4. Deutsch visited Klehr on his farm, examined the feed and confirmed that it was "good" Harvestore feed. App. 269-70.

Klehr fed the Harvestore feed to his cows without seeing any problems until the summer of 1976. During that summer, just after he had used all of the stored silage from 1975, Klehr noticed a few small chunks of mold in the feed. App. 172-73, ¶ 4. When questioned about the mold, Deutsch explained that

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[1]Klehr was also aware of Harvestores because his father bought a small Harvestore in 1955, which he used primarily for grains. Klehr had not experienced problems with this small (17x40) silo because the smaller silos do not always damage feed, having less head space air to accommodate. App. 165-67. In 1980, AOSHPI research concluded: "It has been indicated in the past that unloader air intake to forage structures may be more of a problem with the larger [greater than 20 foot] diameters." App. 925. In addition, some Harvestores, like Klehrs' smaller unit, use an auger to unload free-flowing grains instead of a chain unloader which is used for forage feeds. Grain silos do not form a dome in the feed like the forage silos, making them less susceptible to oxygen degradation. *Compare* App. 669 with App. 670. As AOSHPI noted: "[T]here is a significant quantity of oxygen input due to unloading with a chain unloader in alfalfa haylage." App. 923. The Klehrs' 1974 Harvestore was a 25 foot diameter structure which used a chain unloader for alfalfa haylage.

Klehr should expect to see mold in the feed periodically due to the air that was blown into the silo during fillings. *Id;* App. 173, ¶ 4. Deutsch told him that this small amount of mold would not harm the cattle. *Id.* Klehr accepted this explanation because he had seen the same spoilage in other storage systems. *Id.* He knew that the Harvestore would keep spoilage to a "minimum," but would not eliminate it altogether. App. 802. After that, he was unconcerned when he would see occasional mold in the feed because the silo contained feed from several fillings. App. 276-77; 173, ¶4; 261-62.

In the spring of 1977, and every subsequent year, at the time the silo was nearing empty, Klehr would be required to discard a small amount of molded feed at the end of the feed stack. App. 173, ¶4; 276-77. When he asked Deutsch about this mold, Deutsch again explained that this was the top layer of feed which had reached the bottom. App. 173; ¶4; 470-71. Klehr believed the loss of this feed was insignificant given the large size of the silo. App. 173, ¶4; 751; 308.

The existence of mold at these times did not lead Klehr to suspect that his "good Harvestore feed" was heat-damaged and would harm his cows. As noted above, Deutsch and another MVBA representative, Ben Johannes, examined the feed periodically. App. 474-75; 295. They sometimes observed that it was chopped too dry or too coarse, too short or too wet, but always told Klehr that it was generally satisfactory Harvestore feed. App. 295-98. In fact, the Harvestore salesmen told Klehr that Harvestores only generate bad feed when there is a leak in the silo or farm mismanagement. App. 175-76, ¶8; 461-64.

From the time he purchased his silo, AOSHPI mailed Klehr the *Harvestore Farmer/Harvestore System Farming* magazine. App. 176, ¶ 9; 718-21. Every issue contained testimonials from successful Harvestore farmers and numerous advertisements and educational articles regarding Harvestore

use. Klehr also subscribed to *Hoard's Dairyman*, a magazine which regularly featured promotions and advertisements for AOSHPI silos. App. 810. These materials confirmed Klehr's belief that he had purchased the "Cadillac" of silos and that any problem on his farm must be due to his own farm management or other causes.[2] *Id.* App. 722-45; 771. Accordingly, he continued to use the silo on a daily basis.

In 1982, the Harvestore discharged a significant amount of obviously spoiled feed at the end of the year. App. 290; App. 173-74, ¶ 5. Deutsch inspected the feed and told Klehr that whatever had caused the problem would be fixed. App. 292-93. MVBA repairmen came to the farm, inspected the silo, replaced a broken breather bag and "resealed" the silo. App. 173-74, ¶ 5. MVBA's "repair" of the silo reinforced Marvin Klehr's belief that it was working properly. *Id.*

Sporadically, through the years, Klehr's cows experienced a number of apparently unrelated health problems. App. 174-75, ¶ 6; 169, ¶ 8. Although milk production increased for the first two years after the Klehrs' purchase of the Harvestore, these herd health problems negatively affected milk production in later years. App. 174-75, ¶¶ 6, 7. Klehr attempted to remedy what he believed were the various causes of these problems. App. 168-70, ¶ 8.

When Klehr asked experts, including veterinarians and nutritionists, about the source of a particular problem, they

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[2]Indeed, AOSHPI warned farmers not to relate their farm's success or failure to their Harvestore: "Buyer acknowledges that farming results are very much the product of individual effort combined with various climatic, growing and feeding conditions and therefore he recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan with may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore Structure and allied products, are not guarantees and he has not relied upon them as such." App. 650.

recommended specific treatments. App. 174-75, ¶ 6; 337-39. None of the experts ever suggested that any or all of these problems were caused by heat-damaged feed. All of the problems the Klehrs' herd experienced are common on dairy farms and can be caused by numerous factors. App. 163, ¶ 2(E); 168-70, ¶8; 174-75, ¶ 6. Milk production, in particular, can be affected by many different factors. App. 168, ¶ 8. The Klehrs' problems were not obviously related, either in character or temporal proximity, to bad feed or to the Klehrs' purchase of a Harvestore. App. 168-70, ¶ 8. Neither they nor their advisors ever suspected that these diverse problems had a single common cause or that the heat-damaged feed from the Harvestore was slowly and insidiously poisoning their herd.

V. Marvin Klehr Discovers That the Harvestore Has Been Poisoning His Cattle.

Klehr's first suspicion that spoiled feed was injuring his cows came when he read about a jury verdict against AOSHPI in a February 1991 newspaper article. *See Kronebusch v. MVBA Harvestore System*, 488 N.W.2d 490 (Minn. Ct. App. 1992). He asked a veterinarian and nutritjonist from the University of Minnesota, Dr. William Olson, to visit the farm in the spring, at the time when the Harvestore feed was likely to contain the occasional molds which Deutsch had told him to expect at the end of the feed stack. App. 176-77, ¶ 10.

Before Olson arrived, Klehr unbolted the access panel above the unloader and chopped through a 3½ - 4 foot wall of silage with a four-foot long ice chisel so he would be able to see inside the 15 to 20-foot high feed dome. App. 315. After 1½ - 2 hours of chopping he finally dug a hole large enough to see inside. *Id.* What he saw astonished him: "There was mold hanging all over the silage. . . . There was a spot up there about the size of a good beach ball that was just solid gold." App. 316-17; 177, ¶ 10. Although the feed was covered with

mold inside the silo, both Klehr and Dr. Olson noticed that the "churning" action of the unloader caused the mold to disappear when it emerged from the unloader door. App. 177, ¶ 11. Upon seeing the extent of the mold inside the silo, Klehr suddenly realized that the "good Harvestore feed" he had fed his cattle for 15 years was actually damaged feed. App. 177-78, ¶¶ 11, 12.

Each year, this heat-damaged feed caused the Klehrs new injuries as their farming operation slowly deteriorated. App. 165-66, ¶ 6.[3] After he stopped feeding this spoiled feed to his cattle, herd health and milk production improved dramatically. App. 178, ¶ 12; 982.

VI. Statement Of The Case

Marvin and Mary Klehr commenced a Minnesota state court action against Smith, AOSHPI and MVBA Harvestore within a few months after Klehr discovered the Harvestore fraud. During the course of that action, AOSHPI moved to dismiss the case on statute of limitations grounds. The state court judge denied the motion holding that "there were genuine issues of material fact surrounding the timing and reasonableness of the discovery of the fraud and the timing of the discovery of causation and fraudulent concealment of the grounds for the remaining claims." Record ("R.") 129, Affidavit and Exhibits of Charles A. Bird, Exhibit UU.

The Klehrs voluntarily dismissed their state court action and commenced this action on August 27, 1993, asserting claims against AOSHPI pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18

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[3]Dr. Michael Behr compared the Klehr farm's economic performance with that of comparable operations and concluded that Klehr's damages for lost milk production between 1974 and 1993 totaled $1,812,330. App. 960, 963.

U.S.C. §§ 1961-68. AOSHPI again moved for summary judgment on statute of limitations grounds.

A. The District Court's Decision

The district court found that the Klehrs did not know that the Harvestore was damaging the feed until April 1991, citing Marvin Klehr's testimony regarding his inability to link the damage to his farm operation to the Harvestore:

> At the end of the year, I had an enterprise of hogs, milk, crops, and who knows whatever else. It was all thrown into one kitty, and I never once thought it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs, or bad weather, bad crops . . . I farmed long enough that you cannot project ahead a whole year what you think you are going to get, because it never comes out that way. You take what the good Lord gives you.

875 F. Supp. at 1348. Yet, it held that the Klehrs "should have discovered, through the exercise of reasonable diligence, any fraud committed by Defendants long before 1987." *Id.* at 1350. It based its opinion on the fact that the connection between the intermittent instances of mold in the feed and the herd's health problems "should have been apparent to Klehr by the early 1980s." *Id.* at 1349. It acknowledged that feed and animal health experts had failed to link the herd's health problems to the Harvestore, but decided that *Klehr* should have made the connection. *Id.* at 1350. Thus, the court said Klehr was negligent, first in failing to realize there was a connection between the occasional mold in the feed and his

herd's health problems and second, in failing to investigate that connection to discover the fraud.[4] *Id.*

The court also rejected any tolling of the statute of limitations based on fraudulent concealment on the grounds that the Klehrs "had only to look at the feed coming from the silo and observe the health of their herd" to discover the fraud. *Id.* at 1351. The court also held that when AOSHPI told Klehr that he should expect occasional mold in the feed; that he should expect the feed to be warm, dark and smell of molasses; that Klehr's feed was "good Harvestore feed," that his silo had been "resealed"; and that research confirmed that the silo worked; it was not engaged in any affirmative acts of concealment. *Id.* at 1352, n.6.

B. The Eighth Circuit's Decision

The Eighth Circuit affirmed the district court's summary judgment against the Klehrs based on the following "injury plus pattern discovery" accrual standard:

> An action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.

87 F.3d at 238 (internal quotation marks and citation omitted). Thus, the court held, "it is incumbent upon the Klehrs to show that it would not have been reasonable to discover the existence, source, and pattern of their injury by August 27, 1989."

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[4]Although the court discussed these facts in connection with the Klehrs' common-law fraud claim, it appears to have applied that discussion to the RICO claim. *See id.* at 1352.

Noting that the Klehrs "never asked [veterinary and nutrition] consultants whether the Harvestore could have been the source of the problems" (87 F.3d at 234), the court found that they had not exercised due diligence. *Id.* at 239. Citing its analysis of the common law fraud claims, the court agreed with the district court that the fact that there was occasional mold in the feed (even if explained away by the Harvestore representative) and the fact that the Klehrs had herd health problems and decreased milk production (although Klehr's advisors noted no connection between these problems and bad feed), meant that "the Klehrs were on notice of a possible cause of action for fraud and were required [as a matter of law] to conduct a reasonably diligent investigation" of the silo as a possible cause of the problems. *Id.* at 236.

The court rejected the Klehrs' claim for continuing damage under the separate accrual rule on the grounds that later predicate acts must cause "independent" injuries to create a separate claim. Here, the court held, "the injuries were the same type, flow from the same source, and are part of one cognizable pattern of conduct." *Id.* at 239. Finally, the court held that the Klehrs' negligence "precluded" application of the equitable tolling doctrine. *Id.* at n.11.

This Court granted certiorari in order to address the RICO claims. As shown below, the courts below erred in both their construction of the law and their application of the law to the facts. Accordingly, the judgment should be reversed and the case remanded for trial.

SUMMARY OF ARGUMENT

The Eighth Circuit applied an erroneous "injury plus pattern discovery" accrual rule to determine whether the statute of limitations had run on the Klehrs' RICO claims. This Court should reject that rule, and adopt the "last predicate act" accrual rule used for RICO criminal

prosecutions, in order to further the policy objectives embodied in RICO and simplify RICO litigation. Under that rule, the Klehrs' claim did not accrue until AOSHPI committed the last predicate act in the pattern. *See, e.g., United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989). Because the Klehrs submitted evidence establishing a predicate act in the pattern within the limitations period, their claim is not time-barred.

Even if the Eighth Circuit's "injury plus pattern discovery" accrual rule applied, the courts below erred by (1) placing the burden of proving that their claims were *not* time-barred on the Klehrs and (2) resolving disputed issues of material fact against them. AOSHPI failed to carry the burden of establishing its statute of limitation defense. *See Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 n.9 (11th Cir. 1993). In any event, because the Klehrs submitted evidence establishing that they were not negligent in having failed to discover the RICO injury and pattern within the limitations period, AOSHPI was not entitled to judgment "as a matter of law" on its statute of limitations affirmative defense. *See United States v. Diebold, Inc.*, 369 U.S. 654 (1962). At the very least, the Klehrs are entitled to try their separately accrued RICO claims for recovery of the damages caused by predicate acts committed by AOSHPI during the four years preceding commencement of the action. *See State Farm Mutual Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

Finally, the Klehrs established that the accrual of their RICO claim was tolled by AOSHPI's acts of fraudulent concealment. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996). Accordingly, this Court should reverse and remand for trial.

ARGUMENT

I. THIS COURT REVIEWS THE ENTRY OF SUMMARY JUDGMENT DE NOVO.

Under Fed. R. Civ. P. 56(c), summary judgment may not be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This Court reviews the lower court's determinations of law *de novo*. *See Elder v. Holloway*, 510 U.S. 510, ___, 114 S. Ct. 1019, 1023 (1994).

II. THE COURT APPLIED AN INCORRECT ACCRUAL RULE: THE KLEHRS' CLAIM IS NOT BARRED BECAUSE AOSHPI CONTINUED TO COMMIT PREDICATE ACTS WITHIN THE LIMITATIONS PERIOD.

In this case, the Klehrs seek to recover their damages based on 18 U.S.C. § 1964(c):[5]

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

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[5]Klehrs' § 1964(c) claim is based on AOSHPI's violations of 18 U.S.C. § 1962(a) and (c). To the extent § 1962(a) claims are governed by a rule of accrual different from § 1962(c) claims, the Klehrs do not raise that issue in this appeal.

RICO contains no limitations period time-barring either civil or criminal actions brought pursuant to the Act. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 146, 155-56 (1987) ("*Malley-Duff*"). However, this Court held in *Malley-Duff* that a four-year limitations period applies. *Id.* at 156. The Court expressly left open "the appropriate time of accrual for a [civil] RICO claim." *Id.* at 156-57.[6]

The Eighth Circuit dismissed the Klehrs' RICO claim based on the "injury plus pattern discovery" accrual rule which ties accrual to the date when plaintiff "discovers or should have discovered, both the existence and source of his injury and that the injury is part of a pattern." 87 F.3d at 238. Because this accrual rule is inconsistent with civil RICO's language and underlying purposes, this Court should instead hold that the accrual rule currently applied to criminal RICO cases also applies to civil RICO actions. Under criminal RICO, the statute of limitations runs from the last predicate act in the pattern. *See, e.g., Torres Lopez*, 851 F.2d at 525. Under the last predicate act rule, the Klehrs' claim is timely.

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[6]In the decade since this Court decided *Malley-Duff*, the Courts of Appeals have adopted a number of accrual rules. *See generally* Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) (surveying the rules applied by the courts of appeals); Edwin Scott Hackenberg, Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of* Agency Holding Corp. v. Malley-Duff, 48 La. L. Rev. 1411 (1988) (same); *see also Grimmett v. Brown*, 75 F.3d 506, 510-12 (9th Cir. 1996) (same), *cert. dismissed*, 117 S. Ct. 759 (1997). These courts also apply sub-rules regarding "separate accrual" of actions (*see, e.g., Ammann*, 828 F.2d at 5 (Kennedy, J., concurring)), and equitable tolling. *See, e.g., Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.2d 339, 347 (2d Cir. 1994); *Davis v. Grusemeyer*, 996 F.2d 617, 624 & n.12 (3d Cir. 1993); *see also Rodriguez v. Banco Central*, 917 F.2d 664, 667-68 (1st Cir. 1991).

A. The Court Should Choose a Uniform Accrual Rule Which Promotes RICO's Purposes and Reduces Litigation.

This Court's choice of a uniform limitations period in *Malley-Duff* reflected two important goals: (a) reduction of "intolerable 'uncertainty and time-consuming litigation,'" (*Malley-Duff*, 483 U.S. at 149-50 (quoting *Wilson v. Garcia*, 471 U.S. 261 at 272)), and (b) furtherance of the "design [of RICO's civil damages provision] to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985). These two goals should likewise guide the Court's choice of a civil RICO accrual rule. The accrual rule selected should simplify RICO litigation, balancing the plaintiff's right to recover and the practical difficulties of establishing a violation, against the practical difficulties of hearing the claim. *See generally*, *Wilson*, 471 U.S. at 268. The rule should also promote the statutory goals embodied in the Act, rather than "frustrate or significantly interfere with the federal policies" underlying RICO. *Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989). As shown below, the criminal "last predicate act" accrual rule is an easily applied, uniform rule of accrual which reflects RICO's unique elements and furthers its remedial purposes.

B. The Last Predicate Act Rule Promotes the Purposes Underlying Civil RICO.

1. The last predicate act rule enhances civil RICO's role as a supplement to RICO's criminal enforcement provisions.

Case law decided under criminal RICO provides an appropriate source for selection of an accrual rule because it

employs RICO concepts.[7] Moreover, reference to criminal RICO analysis is consistent with RICO's focus on criminal conduct. *See H.J., Inc.*, 492 U.S. at 245 ("[o]rganized crime was without a doubt Congress' major target" and is the focus of the legislative history); *id.* at 248 ("The occasion for Congress' action was the perceived need to combat organized crime."). Congress enacted RICO primarily to target criminal behavior that was a "regular way of doing business." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989); *see id.* at 242 n.4; Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 838-45 (1980) (reviewing legislative history). The "pattern" and "enterprise" elements focus the Act on crime "organizations" and criminal business enterprises that are able to flourish as a result of prolonged patterns of integrated criminal activity. *See Sedima*, 473 U.S. at 526 (Powell, J., dissenting).

Courts which have balanced the competing interests of RICO criminal defendants with the policies underlying enforcement of the act itself uniformly hold that the criminal

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[7]This Court declined to "borrow" a statute of limitations period from criminal RICO because the criminal statute of limitations, having not been supplied by Congress in drafting the Act, did not "reflect any congressional balancing of the competing equities unique to civil RICO actions." *Malley-Duff*, 483 U.S. at 156. Since the Clayton Act statute of limitations could be said to reflect some measure of Congressional balancing, this Court borrowed it for RICO. Congress did not, however, provide an accrual rule in the Clayton Act. Thus, the Clayton Act cannot serve as a source for discovery of Congress's intentions regarding accrual of RICO claims. *See* 15 U.S.C. § 15b. No federal court of appeals has adopted the Clayton Act accrual rule for RICO claims because RICO's unique multi-act pattern requirement is not shared by the Clayton Act (which targets harm to competition induced by force rather than fraud). *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991). Accordingly, there is no reasoned basis for adopting the Clayton Act accrual rule over the criminal RICO accrual rule.

statute of limitations for violations of § 1962(c) begins to run when the last illegal predicate act in the pattern is committed. Glenn Beard, et al., *Racketeer Influenced and Corrupt Organizations*, 33 Am. Crim. L. Rev. 929, 957 (1996); *see, e.g., United States v. Darden*, 70 F.3d 1507, 1525 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 (1996); *United States v. Starrett*, 55 F.3d 1525, 1544-45 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1335 (1996); *Torres Lopez*, 851 F.2d at 525; *United States v. Persico*, 832 F.2d 705, 714 (2d Cir.), *cert. denied*, 486 U.S. 1022 (1987); *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. 1982); *see also United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir.) (dictum), *cert. denied*, 498 U.S. 1083 (1990). The court in *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.) (mem.), *cert. dismissed*, 439 U.S. 801 (1978), explained:

> The Act provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run. The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of the Act, which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of the Act runs from the date of the last alleged act of racketeering activity.

Id. at 59 (cited with approval by *United States v. Walsh*, 700 F.2d 846, 851 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983)).

This reasoning apples with equal force to civil RICO. *See Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1131 (3d Cir. 1988); *County of Cook v. Berger*, 648 F. Supp. 433, 434-35 (N.D. Ill. 1986). RICO's civil damages provision is an integral part of Congress' effort to combat organized criminal activity. *See Sedima*, 473 U.S. at 493 (RICO is intended to "fill prosecutorial gaps."); *Malley-Duff*, 483 U.S. at 149-50. It was anticipated that civil actions would help bring an end to the perpetrators' pattern of conduct. *See Sedima*, 473 U.S. at 487 ("[T]hose who have been wronged . . . should at least be given access to a legal remedy. . . . [T]he availability of such a remedy would enhance the effectiveness of RICO's prohibitions." (internal quotation marks and citation omitted)).

Basing accrual of a civil RICO claim on the end of an integrated RICO pattern assures that civil RICO actions bring the pressure of "private attorneys general" to bear on ongoing criminal enterprises. *Malley-Duff*, 483 U.S. at 151. As noted above, Congress intended courts to apply civil RICO broadly to supplement criminal RICO and promote its "remedial purposes":

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

Sedima, 473 U.S. at 497-98 (citations omitted).

The last predicate act rule holds intact the claims of all those injured by a single RICO pattern and thereby assures that the enterprise is exposed to the full measure of civil and

criminal responsibility envisioned by Congress. If it were otherwise, civil RICO would do little more to root out criminal enterprises than the relatively ineffective state remedies for individual injuries RICO was intended to supplant. Racketeering enterprises are frequently deeply rooted in legitimate businesses which can absorb the impact of state remedies and still continue their lucrative criminal activities. For this reason, Congress aimed RICO, not at isolated crimes and single injuries (*see H.J., Inc.*, 492 U.S. at 242), but at a defendant's entire "pattern" of crime, thereby striking at the heart of the evil to be remedied.

The circumstances in this case demonstrate the inadequacy of attempts to eradicate pattern conduct through isolated litigation. AOSHPI has been the subject of individual state lawsuits for many years. When it was sued in California in the 1960s, rather than cease its fraudulent activities, its response was defiant: "No little California farmer can whip a big corporation." App. 487; "[I]f [the plaintiffs] do prevail, . . . we can appeal this thing and drag it out for years and years and years[.] Are you prepared to wait?" App. 490. Although AOSHPI was ultimately forced to give up its California market, it continued selling Harvestores elsewhere. RICO's objectives require that the victims of racketeers—private "attorneys general"— be permitted to retain all of their claims until the *pattern* of criminal activity has ended. *See H.J., Inc.*, 492 U.S. at 242 ("Congress was concerned in RICO with long-term criminal conduct."); *Keystone*, 863 F.2d at 1131-32.[8]

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[8]A form of the "last predicate act" rule adopted by the Third Circuit has been criticized because it may permit plaintiffs to bring civil RICO actions long after the wrongdoing has ended. *See, e.g., Rodriguez*, 917 F.2d at 667-68. This "open-endedness" is not a concern if the Court adopts the criminal "last predicate act" rule, which has no "discovery" component. Because the Klehrs were injured by a RICO scheme which has not yet ended,

2. The last predicate act rule offers RICO victims full compensation.

Congress intended civil RICO to provide a legal remedy to those wronged by violations of the Act. *Sedima*, 473 U.S. at 487. Thus, consideration of full compensation is an important factor in adopting a RICO accrual rule. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 340 (1971) (federal law should "fully protect the victims of the forbidden practices"). The last predicate act accrual rule protects the rights of all victims of continuing RICO patterns to compensation for their injuries.

It is unlikely that Congress, in enacting RICO's "broad remedial" provisions, intended that an injured party's statutory right to damages caused by pattern conduct would be lost simply because it accrued at some arbitrary point in the midst of the ongoing pattern.[9] Yet, an "injury-based" accrual rule has precisely that effect:

> It would be inconsistent with [congress's] breadth of definition [of the Act] for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering

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this Court may adopt the last predicate act rule in this case, without deciding whether to use the "discovery" component.

[9]The offenses which constitute "predicate acts" are, for the most part, very serious crimes committed by career criminals associated with networks of co-conspirators with ample financial resources. *See* 18 U.S.C. § 1961(1) (listing, *inter alia*, bribery, counterfeiting, obstruction of justice, embezzlement). There are many reasons a victim of such a crime may not be willing to sue until the end of the criminal association, when he has learned of others with similar claims or when the scheme is at an end and a criminal prosecution has begun. An accrual rule must take into account the difficulties facing victims of crime organizations. *See Reed*, 488 U.S. at 327.

> activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries.

Keystone, 863 F.2d at 1132.

Certainly, in selecting an accrual rule, this Court must attempt to approximate "'the point at which the interests favoring protection of valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Wilson*, 471 U.S. at 271 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). Here, however, the structure and purpose of the Act require that the balance tip in favor of protecting the rights of victims of ongoing criminal enterprises. In selecting a term of ten years within which predicate acts could establish the pattern requirement, "Congress must have contemplated recovery for remote acts and even for remote injuries." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *see also H.J., Inc.*, 492 U.S. at 242 (Congress intended to wipe out "long term criminal conduct."). Claims brought by victims of ongoing pattern conduct are no more "stale" than a criminal action commenced by the government.

A RICO defendant who is engaged in an ongoing criminal pattern, on the other hand, has no legitimate interest in repose. He should have no right to be "free" of responsibility, whether civil or criminal, for his actions. By choosing to continue to engage in activity violating the Act, he himself creates the possibility of long term civil damages exposure. Such exposure simply reflects that he has not "earned" the right to avoid civil or criminal responsibility for his acts. He should not be "'entitled to assume that [his] sins may be forgotten.'"

Malley-Duff, 483 U.S. at 156 (quoting *Wilson*, 471 U.S. at 271).

The suggestion that despite a defendant's continued wrongdoing, his *related* past wrongdoing constitutes a "stale" claim, ironically rewards the very racketeer whom RICO was intended to stop and promotes *no* legitimate public policies. Society, the courts, and Congress can have no interest in permitting a continuing wrongdoer to escape liability for past, related wrongdoing simply because a number of years has passed during which the wrongdoing has continued. The last predicate act accrual rule is the only rule which promotes RICO's purposes to provide compensation to all victims of ongoing RICO patterns and to "extirpat[e]" long-term criminal conduct. *Sedima*, 473 U.S. at 488.

C. The Last Predicate Act Rule Simplifies the Judicial Task and Reduces Litigation.

The "last predicate act" rule not only promotes RICO's purposes, it is relatively simple to apply and reduces time-consuming litigation over the timeliness of claims. Courts can decide the timeliness of a plaintiff's civil RICO claim under the rule simply by determining whether the defendant committed at least one predicate act as part of the pattern of racketeering during the four years preceding the commencement of the action. *See, e.g., United States v. Starrett*, 55 F.3d 1525, 1544-45 (11th Cir. 1995) ("to bring the crime within the statute of limitations under § 1962(c), the government need only prove that at least one predicate act was committed within five years of the date the defendant was charged in the indictment"), *cert. denied*, 116 S. Ct. 1335 (1996). So long as the defendant committed a predicate act within that four-year period, and so long as that predicate act is part of the pattern of racketeering that is the focus of the plaintiff's claim,

then the plaintiff's action—and the government's prosecution—is timely.

The benefit of focusing on the last predicate act in the pattern of racketeering is that the court avoids, at the very outset of the case, defining the point at which a particular plaintiff first suffered a "RICO injury" or when he first should have known that the defendant's "racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J., Inc.*, 492 U.S. at 239. The history of the lower courts' adoption of differing versions of similar injury accrual rules, "separate accrual" subrules and various tolling doctrines suggests that the last predicate act accrual rule is the only rule which will avoid drawing the parties and the courts into protracted and expensive litigation over issues collateral to the RICO claim itself. *See Wilson*, 471 U.S. 261 at 270 (1985) (recognizing federal interest in uniformity and in application of "firmly defined, easily applied rules").

D. The Eighth Circuit's Injury and Pattern Discovery Accrual Rule Fails to Promote the Purposes Underlying RICO.

The Eighth Circuit, in this case, adopted an injury-based accrual rule that provides that the statute of limitations begins to run, "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." 87 F.3d at 238. Although admittedly superior to a straight "injury" rule,[10] the

[10]Because "'[c]oncepts such as RICO "enterprise" and "pattern of racketeering activity" were simply unknown to the common law,'" common-law accrual principles do not apply. *Malley-Duff*, 483 U.S. at 150 (quoting *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 348 (3d Cir. 1986) (Sloviter, J., concurring in the judgment)). An "injury" cannot constitute the sole determinant of the "accrual" of a RICO

"injury and pattern discovery" rule, like other injury-based rules, operates to cut off valid claims such as the Klehrs', despite the existence of an ongoing RICO pattern. This Court should not hesitate to reject this accrual rule and adopt the last predicate act rule in order to promote RICO policies and ease the judicial task. "RICO was an aggressive initiative to *supplement* old remedies and develop *new methods* for fighting crime." *Sedima*, 473 U.S. at 498 (emphasis added). It is "in this spirit that all of the Act's provisions should be read." *Id.* Consistent with this admonishment, this Court should adopt the accrual rule tailored specifically to accommodate the unique elements and purposes of a civil RICO claim: the criminal RICO "last predicate act" rule.

Applied to this case, the last predicate act rule renders the Klehrs' claim timely. This action was commenced in August 1993. The Klehrs submitted evidence establishing predicate acts through at least 1991. *See*, App. 17. Thus, the four-year limitations period did not expire before the suit was brought. Accordingly, the Klehrs ask this Court to reverse the decision

claim because a RICO plaintiff must show injury from acts in a pattern and the predicate acts which form the pattern may occur after the injury. *See Sedima*, 473 U.S. at 496; *Keystone*, 863 F.2d at 1130 (It would appear fundamental that the statue of limitations may not begin until all elements exist); *Butler v. Local Union 823*, 514 F.2d 442, 450 (8th Cir.) (There is no accrual until all facts exist so plaintiff can allege a complete cause of action.), *cert. denied*, 423 U.S. 924 (1975). Nevertheless, some courts have adopted "injury" accrual rules which bar an action before it even exists. *See, e.g., Rodriguez*, 917 F.2d 664. This approach is not only nonsensical, but a rule which would bar a claim before it accrues "would in effect eliminate § 1964(c) from the statute" for those plaintiffs. *Sedima*, 473 U.S. at 498. Such a result is hardly consistent with the purpose of "bringing to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Malley-Duff*, 483 U.S. at 151.

of the Eighth Circuit, and remand this action to the district court for trial.

III. THE EIGHTH CIRCUIT MISAPPLIED THE PATTERN PLUS INJURY STANDARD.

Even under the erroneous "injury plus pattern discovery" standard employed by the courts below, AOSHPI was not entitled to summary judgment dismissing the Klehrs' RICO claim. As a threshold matter, the Eighth Circuit improperly placed the burden of disproving the statute of limitations affirmative defense on the Klehrs. It then resolved disputed issues of fact regarding whether the Klehrs should have discovered the connection between their injuries and the heat-damaged feed prior to 1989. Accordingly, this Court should reverse.

A. The Eighth Circuit Improperly Placed the Burden of Proof on the Klehrs.

In this case, the fact that AOSHPI, the *moving* party, bore the burden of proof is significant. As the moving party, AOSHPI bore the initial burden of establishing that summary judgment was appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A district court, in deciding whether the moving party has met this burden, must determine which party bears the ultimate burden of persuasion at trial. *Id.* at 331 (Brennan, J., dissenting.). If the party moving for summary judgment also bears the burden of proof on a claim, it must support its motion with undisputed material evidence on each element of its claim. *Id.*

Because AOSHPI bore the burden of establishing the statute of limitations affirmative defense, it was not entitled to summary judgment unless it produced sufficient evidence to

obtain the equivalent of a directed verdict on that defense.[11] *See Celotex*, 477 U.S. at 322-23; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Not until this level of proof was reached should the Klehrs have been required to put in *any* evidence to defeat the motion for summary judgment. *Augustine v. GAF Corp.*, 971 F.2d 129, 132 (8th Cir. 1992). Once AOSHPI met the burden of production, the court was required to examine the parties' evidence in the light most favorable to the Klehrs, giving them the benefit of every inference and resolving all factual disputes in their favor. *See United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Only if no reasonable jury could find for the Klehrs, should AOSHPI have been entitled to prevail without a full trial.[12]

Under Federal law, the statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c). Because the party pleading an affirmative defense bears the burden of

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[11] If the *non-moving* party bears the burden of persuasion on the issues at trial, summary judgment may be granted if the *non-moving* party fails to offer proof creating a jury issue on every element of its claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[12] Summary judgment standards should be enforced so that summary judgment is not used to avoid the necessity for proving one's case or as a clever procedural gambit whereby a claimant can shift to an adversary the burden of proof on one or more issues. *See* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?* 63 Notre Dame L. Rev. 770, 781 (1988). One author describes the lower courts' reaction to *Celotex* as a backlash or "anti-plaintiff counter-revolution." *See generally* D. Michael Risinger, *Another Step in the Counter-Revolution: a Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35 (1988); *See also* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative Process*, 49 Ohio St. L.J. 95, 159 (1988) (By making summary judgment easier to obtain, courts implicitly bestowed a political favor (and greater judicial power) . . . on society's "haves.").

proof, (*see Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 n.9 (11th Cir. 1993)), AOSHPI had the burden to prove that the Klehrs' RICO claims were barred. Contrary to these rules, the Eighth Circuit held that *"[I]t is incumbent upon the Klehrs to show* that it would not have been reasonable to discover the existence, source, and pattern of their injury by August 27, 1989." 87 F.3d at 238 (emphasis added).[13] In so holding, the Eighth Circuit improperly saddled the Klehrs with the burden of proof. Accordingly, this Court should reverse.

B. The Klehrs' Failure to Discover That the Harvestore Caused Heat Damage to Their Feed and That the Feed Damaged the Cattle Was Reasonable.

The first step in applying the "injury plus pattern discovery" rule is to identify the RICO injury for which the plaintiff seeks relief. Here, the Klehrs seek to recover for the damage caused to their farm as a result of their cattle's consumption of heat-damaged feed from the Harvestore. As shown below, reversal is required because AOSHPI failed to prove that the Klehrs knew or should have known that this feed was heat damaged, as a matter of law. *See Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962) (the purpose of the rule is not to cut litigants off from their right of trial by jury).

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[13]The Eighth Circuit not only put the burden of proof on the Klehrs, it articulated an erroneous standard. The issue is not whether it would have been "reasonable" for a hypothetical farmer to have discovered the fraud. In determining whether the Klehrs "*should* have discovered the fraud," the question is whether AOSHPI proved, as a matter of law, that the Klehrs failed to act as reasonably prudent farmers given the circumstances, *i.e.*, whether their actions fell *outside* the bounds of reasonable conduct.

1. No evidence of bad feed existed.

The lower courts held, as a matter of law, that the Klehrs should have known that their feed was defective because Marvin Klehr saw pieces of mold in the feed sporadically during the year and at the end of the year was required to discard the remnants of the feed stack. *See* App. 172-73, ¶ 4. The courts' focus on occasions of moldy feed ignores the fact that the feed which damaged the Klehrs' cattle, and which is the basis for this action, was not moldy feed, but warm, dark, molasses-smelling, "good Harvestore feed."

The evidence did not demonstrate that the existence of mold in some of the feed, on some occasions, must lead, as a matter of law, to discovery that the "good" feed was in fact heat-damaged. Harvestore representatives examined the feed and assured Klehr that the feed was good. App. 172-73, ¶4. AOSHPI's representative explained that the mold resulted from exposure of the top layer of feed to air at the time the silo was filled. This spoilage was insignificant in proportion to the "good" feed stored, and was consistent with Klehr's expectations for the silo's performance based on his experience with stave silos and the fact that he filled his silo several times during the year. *See* App. 172-73, ¶ 4. *See Chitwood v. A. O. Smith Harvestore Prods., Inc.*, 489 N.W.2d 697, 705 (Wis. Ct. App. 1992) (it is not contradictory for the farmer to know some oxygen gets into the silo and to also believe that the Harvestore admits less oxygen than a standard silo). There was absolutely nothing about this occasional mold that required Klehr to know that air entered the silo *after* it was "sealed" and damaged the "good" feed.

2. The Klehrs acted prudently in their investigation of herd health problems.

The courts below said that the Klehrs should have known that the "good" Harvestore feed was damaging their cows because they had not realized all of the promised benefits of Harvestore ownership and because herd health had generally declined over the years. The flaw in this analysis is that, as shown below, there is no evidence that the Klehrs were negligent in failing to discover any connection between broken sales promises or herd health problems and the existence of heat-damaged feed. *Hines v. A.O. Smith Harvestore Products, Inc.*, 880 F.2d 995 (8th Cir. 1989).

a. Klehr's conduct should be judged by prudent farmer standards.

AOSHPI submitted no testimony from any competent source proving that the Klehrs failed to act as prudent farmers in addressing herd health problems or in failing to detect that bad feed was their source. Farming is complex and involves unique skills and experience. (*See, e.g.*, App. 680 (plant tissue analysis may help farmers determine whether "a subtle deficiency or imbalance of some vital element . . . is throwing off his crop productivity"); App. 815-16 (haylage making is an "art")). Accordingly, a farmer's due care should be judged by an appropriate standard reflecting standard farm practices and expertise. *See Linkstrom v. Golden T. Farms*, 883 F.2d 269, 271 (3d Cir. 1989). Yet AOSHPI submitted no evidence at all regarding the reasonableness of the Klehrs' actions, judged by farm standards. Given the burden of proof, AOSHPI's failure to submit such proof required the denial of summary judgment.

Even if the Klehrs were required to bear the burden of proving that they acted with ordinary diligence, however, they submitted a wealth of evidence establishing that their actions fell within "prudent farmer" standards. Klehr testified that he reasonably investigated his herd's health problems and both he and his consultants were unable to determine their cause. App. 174-75, ¶6. The Klehrs submitted the affidavit of an expert veterinarian who opined that the Klehrs' failure to connect the herd health problems to bad feed was reasonable.[14] Indeed, not until the Harvestore had there been a *silo* which caused illness in cows. Because the evidence in the record does not establish lack of due diligence as a matter of law, the courts' entry of summary judgment was erroneous. *See Hildebrandt v. Allied Corp.*, 839 F.2d 396, 399 (8th Cir. 1987) (Where issues of limitation involve when a claim begins to accrue, summary judgment cannot be granted unless the evidence is so clear that there is no genuine factual issue.).

b. AOSHPI's "puffery" is irrelevant.

The Eighth Circuit's focus on the Harvestore's failure to live up to some of AOSHPI's advertising promises, such as the Harvestore's production of *better*[15] feed, as the "tip-off"

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[14]The fact that many farmers have asserted claims against AOSHPI in the last decade and these claims have reached juries notwithstanding the defendants' statute of limitations defense, suggests that it is reasonable for a farmer to fail to make the connection between the silo and the damage to the farming operation. *See Lollar*, 795 S.W.2d 441; *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925 (Tenn. 1991); *Agristor Leasing v. Saylor*, 803 F.2d 1401 (6th Cir. 1986).

[15]Of course, the Klehrs had no idea that the "good Harvestore feed" was not "better" feed. In any event, the Klehrs' lawsuit is based, not on the failure of the Harvestore to produce better feed but on its production of heat-damaged feed.

that the silo was causing the herd's health problems, was misplaced. AOSHPI's "puffery" is simply irrelevant because there is no evidence that any of AOSHPI's sales promises was a "red flag" pointing to the bad feed injury that forms the basis for the Klehrs' claims. AOSHPI made numerous claims touting the value of the silo, including the promise that the Harvestore would "Keep sons on the farm." App. 727. Neither Klehr nor any other farmer would naively believe that all such promises would come true. Indeed, Harvestore specifically told farmers:

> It's no magic, miracle-making device that automatically brings wealth and success to its owner. And, its certainly no cure-all for problems that arise from poor management—in fact, a Harvestore might only intensify the trouble where poor management is at fault!

App. 719. *See also* App., 815 (Harvestore is "no magician's box of tricks which can take poor quality feed and transform it into high-quality haylage."). *Cf. D'Huyvetter v. A.O. Smith Harvestore Prods., Inc.*, 475 N.W.2d 587, 592 (Wis. Ct. App. 1991) (it is not necessary for a Harvestore purchaser to have met "every positive statement with incredulity"); *Chitwood*, 489 N.W.2d at 705 (jury need not find reliance on every misrepresentation in order for company to be liable.); *Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 268 (6th Cir. 1989). Even if a farmer did believe all of the Harvestore sales talk, the failure of these benefits to materialize would not require a reasonably prudent farmer to suspect that the Harvestore feed was heat-damaged. AOSHPI provided the court no evidence establishing that a farmer should, as a matter of law, recognize a link between the two.

Had the Eighth Circuit recognized that AOSHPI had the burden of establishing its statute of limitations defense, it is

unlikely that it would have erroneously affirmed summary judgment in AOSHPI's favor. As it is, the evidence in the record demonstrates that AOSHPI failed to carry its burden of establishing that the Klehrs' RICO claim is barred. Accordingly, this Court should reverse.

IV. THE EIGHTH CIRCUIT ERRED WHEN IT REJECTED THE KLEHRS' RICO CLAIM FOR INJURIES OCCURRING WITHIN FOUR YEARS OF COMMENCEMENT OF THE ACTION.

A. A New RICO Claim Accrues With Each Injury.

If this Court adopts an "injury"-based accrual rule, the Klehrs are entitled to recover the damages they suffered during the four years preceding the commencement of the action, whether or not their claim for earlier damages is barred by the statute of limitations. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court determined the date of accrual of a plaintiff's damages where, as here, the plaintiff has suffered continuing damage from a violation of federal statute. The Court first noted that under the Clayton Act,

> each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . , as to those damages, the statute of limitations runs from the commission of the act.

Id. at 338. The Court observed, however, that this rule undercompensates a plaintiff who suffers additional damages which, four years after the injurious act, are speculative or unprovable. *Id.* at 339. Accordingly, the Court held that at any particular point in time, "no cause of action has yet

accrued for any but those damages already suffered." *Id.* The claim accrues for such damages "*only on the date they are suffered*; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." *Id.* (emphasis added). Any other rule would be "contrary to the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement'" (*id.* at 340 (quoting *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968)) and would not "fully protect the victims of the forbidden practices as well as the public." *Id.*

Because the injury plus pattern discovery accrual rule focuses on each new RICO injury rather than on the unitary RICO pattern, *Zenith's* "separate accrual rule" creates a new RICO cause of action each time a plaintiff suffers an injury during the limitations period, so long as the damages are caused by a predicate act in the pattern. Thus, if the Court adopts an "injury-based" accrual rule, the Klehrs must be permitted to recover the damages they suffered as a result of AOSHPI's RICO scheme during the four years preceding the commencement of this action.

B. Because AOSHPI Committed Predicate Acts Within the Limitations Period, the Klehrs Have an Additional Basis For Recovery of their Damages.

Some courts, including the Eighth Circuit, have restricted *Zenith* and permit recovery for injuries within the limitations period only if they were caused by predicate acts which also occur within the limitations period. *Granite Falls Bank*, 924 F.2d at 154. In *State Farm Mutual Auto. Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987), then-Judge Kennedy applied this formulation of the "separate accrual" rule in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period.

Id. at 5 (Kennedy, J., concurring). Although the Klehrs believe that these courts have misread *Zenith*, they are entitled to recover under this even more restrictive rule because AOSHPI committed predicate acts within the limitations period which caused damage.

The Eighth Circuit held in this case, however, that no separate claim accrues unless new predicate acts cause injuries which are "independent" from the original injury. Because the Klehrs' injuries were "all of the same type, flow from the same source, and are part of one cognizable pattern of conduct," they were, the court held, "one single, continuous injury that was sustained sometime in the 1970s." 87 F.3d at 239. Accordingly, the court held that their claims were barred.

There is no sound basis for the Eighth Circuit's requirement that the Klehrs' injuries be "independent from" their past injuries or that they arise independently of AOSHPI's prior pattern conduct. This analysis would put a plaintiff in the impossible position of having to prove both that his injuries from two separate predicate acts are related—to establish pattern—and that they are unrelated—to establish separate accrual. Under the separate accrual rule, it is irrelevant whether the damages are of a certain "type" or that they arise from the same pattern. *See Sedima*, 473 U.S. at 495 ("If the defendant engages in a pattern of racketeering activity . . . , and the racketeering activities injure the plaintiff . . . , [he] has a claim under § 1964(c).").

The Eighth Circuit's decision creates an intolerable incentive for a racketeer to continue to harm a victim of an earlier time-barred violation so long as the injuries are of the same type and "are part of one cognizable pattern of conduct."

If anything, such a rule will encourage racketeers to victimize those in society who are most credulous and who, accordingly, fail to discover the fact that they have been cheated. In effect, this rule elevates the interests of the criminal wrongdoer, over the interests of a victim who "should have" discovered the source and pattern of wrongdoing earlier. *See BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1599 (1996) (deceit is more reprehensible than negligence).

In this case, after AOSHPI sold the Klehrs their silo, it continued to victimize them by encouraging them to use the silo, by "repairing" it, by "resealing" it and by supplying them with advertisements and "educational" material which convinced them to continue feeding their cows feed which, unknown to them, was heat-damaged. As a result, their continued use of the Harvestore caused new injuries: the cattle exhibited new illnesses requiring treatment and milk production declined. *See Bieter v. Blomquist*, 987 F.2d 1319, 1325-27 (8th Cir.) (refusing to apply unduly restrictive understanding of proximate cause to civil RICO action, *cert. denied*, 510 U.S. 823 (1993). Yet, accepting *arguendo*, the Eighth Circuit's factual determinations, the Klehrs are left without remedy despite no wrongdoing on their part and absolute wrongdoing (including an ongoing pattern of predicate acts and an ongoing "coverup" of those acts) on the part of AOSHPI. Such a result is inconsistent with Congress' stated intent to extirpate the wrongdoing that is the target of RICO. This Court should reject the Eight Circuit's interpretation of the "separate accrual" rule and remand the case for trial on the claims arising in connection with AOSHPI's predicate acts committed within four years of the start of this action.

V. AOSHPI'S FRAUDULENT CONCEALMENT PREVENTED THE RUNNING OF THE FOUR-YEAR LIMITATIONS PERIOD.

If the Court both rejects the "last predicate act" rule and finds Klehr's action to be untimely as a matter of law under an "injury discovery" or "injury plus pattern discovery" accrual rule, then the Court should reverse because the statute is tolled by AOSHPI's fraudulent concealment of the claim. The theory of fraudulent concealment, which is "read into every federal statute of limitation," (*Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)), has two competing formulations. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).[16] One formulation—which parallels equitable tolling and the "discovery" rule—requires that "the plaintiff . . . use due diligence to be allowed to toll the statute of limitations." *Id.* Under the other formulation, which focuses on "active misconduct by the defendant, the plaintiff is not required to be diligent." *Id.*[17]

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[16]Since this Court's decision in *Malley-Duff*, there has been unanimity in the courts of appeals that federal rather than state tolling doctrines apply to civil RICO actions. *See, e.g., Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 347 (2d Cir. 1994); *Davis v. Grusemeyer*, 996 F.2d 617, 624 & n.12 (3d Cir. 1993); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1453 (7th Cir. 1991); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988).

[17]If the Court adopts a non-discovery rule, the Klehrs' claim is tolled under any formulation of the fraudulent concealment or equitable tolling doctrines. *See Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415-16 (9th Cir. 1987) (applying "discovery," as opposed to "actual knowledge," version of fraudulent concealment doctrine to civil RICO action). Equitable tolling doctrines apply because the lower courts' determination that the Klehrs should have discovered the fraud is erroneous for all of the reasons discussed in part IIIB, above.

The latter rule should apply here. As the Second and Seventh Circuits have acknowledged, the purpose behind the fraudulent concealment rule is disserved by making its scope coterminous with the "discovery" rule. *See Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979); *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) ("a defense based on the plaintiff's lack of due diligence must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment").

Rather, the rule should punish a defendant who actively conceals his original wrongdoing. *See Riddell*, 866 F.2d at 1491; *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 502 U.S. 1250 (1991). The *Tomera* court explained: "'[I]f the wrongdoer adds to his original fraud affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character, by virtue of which he deprives it of the protection of the statute until [actual] discovery.'" 511 F.2d at 510 (quoting *Smith v. Blachley*, 47 A. 985, 987 (Pa. 1901)). The *Riddell* court explained that a defendant's burden of establishing "something close[] to actual notice" results from the fact that

> fraudulent concealment by its nature makes discovery of the true facts more difficult, in part because it obscures the significance of such information as comes to plaintiff's attention. Furthermore, the concealing defendant lacks the equity to command easier access to the defense, especially in view of the inherent evidentiary difficulty of determining whether particular but isolated facts should have put the plaintiff on inquiry notice of his claim.

866 F.2d at 1491. This rule makes sense because deceit is more reprehensible than negligence, and should not be rewarded. *See BMW*, 116 S. Ct. at 1599.

Judges Becker and Posner have each outlined the policy rationales for applying a different rule of fraudulent concealment to affirmative acts of misconduct. *See Wolin*, 83 F.3d at 852; *Urland*, 822 F.2d 1268, 1280-81 (3d Cir. 1987) (Becker, J., dissenting). In *Urland v. Merrell-Dow Pharmaceuticals*, Judge Becker explained that the perpetrator of affirmative acts of concealment should not benefit from a victim's lack of diligence:

> The doctrine of fraudulent estoppel rests on a rationale that is wholly distinct from that for the discovery rule. It concerns not the diligence of the plaintiff but the misdeeds of the defendant; it therefore addresses the situation where a cause of action goes undiscovered because the defendant has taken positive steps to conceal it. . . .
>
> . . . When a defendant fraudulently conceals its misconduct, . . . the injured person has a double burden: not only is there a burden of discovering the basis of the claim, he or she must also discover the defendant's fraud. A "should have known" standard is therefore inappropriate because it is also necessary to account for the plaintiffs' extra burden of acquiring knowledge of the fraud, without which they could not discover, or realize that prior to the fraud they had discovered, the basis for the claim.

822 F.2d at 1280-81 (citation and footnote omitted).

One way to "account[] for this extra burden is by insisting on a higher threshold of knowledge on the part of the plaintiff before the claim will be barred—the 'actual knowledge' standard . . . ." *Id.* at 1281. If the Court does not account for the extra burden on the plaintiff that exists in cases of affirmative concealment by a defendant, the Court may

> unwittingly adopt[] a standard that . . . arguably encourage[s] fraudulent concealment by defendants. Because, through the discovery rule, the statute of limitations does not begin to run until the plaintiff should have known of defendant's liability, application of the "should have known" standard in fraudulent concealment cases creates no greater burden; defendants face no penalty if they attempt to conceal their wrongdoing but are later discovered.

Id. "In contrast," Judge Becker notes, "the actual knowledge standard 'serves as a punitive measure and perhaps as a deterrent of future fraud.'" *Id.* (quoting *Hohri v. United States*, 782 F.2d 227, 248 (D.C. Cir. 1986), *vacated for want of jurisdiction*, 482 U.S. 64 (1987)).

Chief Judge Posner's analysis of the issue is equally cogent:

> An analogy can be drawn to the distinction between accidental and deliberate torts. There is no defense, partial or complete, of contributory negligence to the latter, but there is to the former. Deliberate wrongdoing is not to be blamed on the victim, just as the victim's provocation or other fault is not a defense to criminal liability.

Wolin, 83 F.3d at 852. The very same principle applies in the case of affirmative acts of concealment by a defendant: there

can be no defense, partial or complete, of some failing on the part of the victim.

AOSHPI should not be rewarded for successfully concealing its prior fraud. It was not until Marvin Klehr unbolted a panel on his silo and chopped through several feet of "good Harvestore feed" to find mold cascading from the feed dome that he actually knew what AOSHPI had done to his dairy herd, his way of life, and their family's financial well-being. This discovery should be the point at which the statute of limitations should begin to run.

CONCLUSION

Bearing in mind that the rule of accrual the Court adopts in this case will broadly impact all RICO cases including those involving organized crime syndicates, the Klehrs ask this Court to adopt the one rule which promotes the purposes of RICO: the last predicate act rule. Accordingly, the Court should reverse the judgment below and remand to the district court for trial on the merits.

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